IN THE

# Supreme Court of the United States

OCTOBER TERM, 1936.

No. 532.

UNITED STATES OF AMERICA,

Petitioner,

*v.*

MORGAN BELMONT and ELEANOR R. BELMONT, as Executors of the Last Will and Testament of August Belmont, Deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## RESPONDENTS' BRIEF

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Respondents.

## RESPONDENTS' BRIEF

### Opinions Below

The Opinion of the United States District Court for the Southern District of New York (R., p. 17) is not reported. The Opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 85 Fed. (2d) 542 (R., p. 22).

### Statement

This action was at law, brought by the United States in the District Court against the Executors of August Belmont, deceased, claiming to recover the amount of a deposit account of a Russian Metal Company with his New York banking firm of August Belmont & Co.

The essential facts alleged in the complaint were that the Russian metal company had on deposit with the Belmont

firm, before 1918, a sum of money, which remained on deposit thereafter and that in 1918 certain decrees of the Russian State, including a decree, a copy of which was annexed to the complaint, together with a translation, dissolved, terminated and liquidated certain Russian corporations and nationalized and appropriated all of their assets (R., p. 3).

It was further alleged that by these decrees the metal company was dissolved terminated and liquidated and that its property and assets, wherever situated, including the deposit with the Belmont firm, were appropriated by the Russian State (R., p. 4).

The complaint further alleged that the Russian decrees did not provide for the payment of the claims of creditors of the Metal Company, except salaries and wages of employees, nor for compensation to its stockholders upon the nationalization and appropriation of its property and assets (R., p. 4).

The complaint also alleged that as a result of these decrees the deposit became the property of the Russian State and remained so until November, 1933, at which time the Government of the Union of Soviet Socialist Republics assigned to the United States all amounts admitted to be due or that might be found to be due to the said Russian Government as the successor of prior Governments of Russia, or otherwise, from American nationals, and that this included the deposit account with Belmont & Co. (R., pp. 4, 5, 12-16).

There are appropriate allegations as to the Belmont firm, the death of Mr. Belmont, the appointment of the defendants as Executors in the Surrogate's Court of Nassau County, New York, and the demand for payment for the amount of the deposit account, namely, $25,438.48, with interest, costs and disbursements (R., pp. 3, 4, 5).

In the District Court below the defendants moved to dismiss the complaint as being insufficient to constitute a cause of action against them and this motion was granted on the

authority of *U. S.* v. *Bank of New York and Trust Company*, 10 Fed. Supp. 269 (R., p. 17).

In the District Court two questions were raised, namely, as to the extra-territorial effect of the Russian decrees and as to the effect of the assignment. Judge COXE in the District Court, in *U. S.* v. *Bank of New York and Trust Company*, 10 Fed. Supp. 269, had decided both these questions in the negative, and Judge HULBERT, in the same Court, in dismissing the Second Amended Complaint herein followed this prior decision as controlling (R., p. 18).

Judge COXE's decision in the earlier case had been affirmed by a divided Circuit Court (77 F. [2d] 866), and unanimously by this Court (296 U. S. 463). But in both the Circuit Court of Appeals and in this Court the case was decided on a jurisdictional point to the effect that the Federal Courts should not interfere with the administration of the funds, of which the deposit accounts formed a part, by the New York State Courts. Funds deposited with the New York State Superintendent of Insurance by Russian insurance companies that had been doing business in New York were being liquidated and administered by him under State Court direction and surpluses deposited in bank subject to State Court order. The deposits were still subject to the order of the New York State Supreme Court in the liquidation proceedings in those cases.

## Questions Presented

1. Whether the plaintiff is entitled, under a purported assignment from the Soviet Government, to recover a judgment at law for the amount of a deposit account made in New York with New York bankers by a Russian metal corporation prior to the Russian revolution, by virtue of Soviet decrees nationalizing the corporate enterprise and confiscating its assets.

2. Whether the bank deposit in this case, or the obligation of the bankers with respect thereto, was subject to or governed by the Soviet decrees of confiscation.

3. Whether the courts of this country will give extraterritorial effect to Russian decrees of confiscation so as to recognize, and enforce, as a result of such decrees, a title to a deposit account located in the State of New York, under a purported assignment of such property by Russia to the United States, accepted by the President of the United States, after the recognition of Russia by this country, when New York refuses to recognize a title to such property so located within its borders based on such decrees as contrary to public policy.

4. Whether confiscation of private property in New York by a foreign country is against public policy.

5. Whether the Litvinoff Letter, properly construed, did in fact purport to assign title to the deposit in question to the United States.

## Summary of Respondents' Argument

Foreign decrees of confiscation have no extraterritorial effect upon private property in New York. Where comity and public policy conflict, the latter will prevail. We recognize the effect of decrees of foreign governments on property within their territorial limits, but not on property elsewhere when those decrees are contrary to our own laws and sense of justice.

In New York the law is that attempted confiscation by a foreign government of property in New York will not be given effect. It is clearly against the public policy of the State. The deposit account is property located in New York, where it was made and maintained, and where it was payable. All questions of its ownership and of performance of the contract are governed by New York law. This is a question of title to private property to be governed by the State law. Even a foreign assignee is subject to this law, but the Soviet government was not like a statutory successor, where rights of creditors and stockholders are preserved. This was confiscation, not succession, in our sense.

A bank deposit is property in the state where the bank is, and that state has full dominion over it.

Where the question is one of confiscation, the fact that the deposit is a debt, and the creditor Russian, does not support the argument that Russian law governs, or that our law does not govern. If the deposit had a situs, it was in New York, not Russia. Authority and common sense unite in saying that the State of New York has full dominion over the property.

The doctrine of *mobilia personam sequuntur* does not apply. It is a fiction which should not be extended beyond its present scope.

Comity should not require recognition of decrees of confiscation repugnant to public policy nor enforcement of a foreign penal law. Nor should some law other than that of New York be applied, since respondents are New York executors.

Decisions abroad are in accord with New York law.

Confiscation involves more than regulation of the internal relations of a corporation, and *Canada Southern Ry. Co.* v. *Gebhardt*, 109 U. S. 527, does not apply.

Public policy of both state and nation are opposed to plaintiff's claim. Public policy is to be found in the Constitution and laws and the course of administration and decisions. Federal and state constitutions forbid the taking of private property without due compensation, and the deprivation of property without due process of law. The decisions of the courts, and the constitutions, are all evidence of the public policy here to be applied. They are clearly opposed to the confiscation of private property.

Neither the acceptance of the Litvinoff assignment nor recognition of the Soviet government as *de jure* affect the public policy or law applicable to the question here, which is one for the courts and not for the Executive. The alleged transfer of the claim to the United States could not give it any greater validity than it had in the hands of its assignor.

It is questionable whether the Litvinoff Letter in any event assigned title to the deposit to the United States.

## Argument

## POINT I

### The Russian Decrees of Confiscation Have No Extra-territorial Effect Upon Property in New York at the Time of the Decrees.

It is a well recognized principle that decrees of foreign nations are given extraterritorial effect only by comity. Comity does not require us to enforce foreign decrees with respect to property here when they are contrary to our public policy and sense of justice. Where the two conflict, the public policy of the forum must prevail. The confiscation of private property is contrary to our laws and Constitutions. It is too late now to ask an American court to enforce a foreign confiscatory decree with respect to such property in this country at the time of the decrees. Perforce, we must recognize the power of a foreign government over property that is within its territorial jurisdiction. Its dominion in its own territory is as complete as ours in our territory. This will explain cases cited by the petitioner, such as the *Oetjen*, *Ricaud*, and *Salimoff* cases, where at the time of a foreign decree property is within the territorial limits of the foreign government. Where, however, property is outside the territorial limits of the foreign sovereign at the time of decree, no effect will or can be given to the act or decree of confiscation, as full dominion is clearly within the jurisdiction of the state or nation where it is. It cannot be affected by the decrees of any other nation. The authorities can be reconciled, if this distinction is borne in mind.

### A

### New York Refuses to Give Extraterritorial Effect to Soviet Decrees of Confiscation as to Property Located in New York.

It is clear that by the law of New York extra-territorial effect will not be given to the Soviet decrees of confiscation as to property located in New York at the date of the de-

crees. It is against the public policy of the state to enforce them with respect to such property.

In *Vladikavkazsky Railway Co.* v. *New York Trust Co.*, 263 N. Y. 369, decided after recognition by this country of the Soviet Government, a Russian railroad corporation sued to recover a deposit in a New York bank. The Bank defended, *inter alia*, on the ground that since the nationalization of the railroad, its directors were acting without authority in claiming the deposit. In holding that the defenses were insufficient, the Court said, at pages 378-379:

"The deposit was made in New York City, the home of the bank; that is where the contract obligation was created and where it is by its terms to be performed, entirely outside Russian jurisdiction. Laws of foreign governments have extraterritorial jurisdiction only by comity. (*Huntington* v. *Attrill*, 146 U. S. 657, 669.)

"The principle which determines whether we shall give effect to foreign legislation is that of public policy. (*Russian Reinsurance Co.* v. *Stoddard*, *supra*; *Joint Stock Co.* v. *National City Bank*, 240 N. Y. 368, 377; *Russian Socialist Federated Soviet Republic* v. *Cibrario*, 235 N. Y. 255, 263.)

"Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail. (*Russian Socialist Federated Soviet Republic* v. *Cibrario*, *supra*.)

"It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. (*Baglin* v. *Cusenier*, 221 U. S. 580.)

"We enforce the same principle even in regard to statutes of sister States. (*Barth* v. *Backus*, 140 N. Y. 230, 239.)

"The fact that the present Russian government was not recognized was not the basis of our refusal to give effect to its decrees nationalizing corporations and confiscating their property. During the period when those decisions were made, we recognized and enforced 'mere ordinary legislation,' relating to 'every day transactions of business or domestic life.' (*Petrogradsky M. K. Bank* v. *National City Bank, supra; Matter of People* [First Russian Ins. Co.], 255 N. Y. 428, 432.)

"Prior to recognition we clearly intimated that our decision would have been the same if at the time recognition had been granted. (*James & Co.* v. *Second Russian Insurance Co.*, 239 N. Y. 248, 257.)

"The general statement contained in the opinion in *Salimoff & Co.* v. *Standard Oil Co.* (262 N. Y. 220), to the effect that recognition of a *de facto* government as a *de jure* government is retroactive in effect and validates all the acts of the government so recognized from the commencement of its existence, must be read in connection with its context and as so read it did not refer to acts sought to be given effect extraterritorially."

Cf. language in *Petrogradsky M. K. Bank* v. *Nat. City Bank*, 253 N. Y. 23, at page 29; *Joint Stock Co.* v. *Nat. City Bank*, 240 N. Y. 368, at page 377; *Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149, at page 168; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, at page 90.

See also, New York Session Laws, 1936, Chapter 917, new Section 977-B, New York Civil Practice Act, Subdivision 19.

The *Vladikavkazsky* and *Dougherty* cases were decided after recognition, the others before. In the *Dougherty* case, the Court recognized the effect of the Russian decrees as to contracts to be performed in Russia under Russian law. In the *Vladikavkazsky* case, the Court refused to do so as to a bank deposit in New York.

In the face of the definite expressions of the Court in that case it can scarcely be argued that there was no refusal to

recognize the Soviet government's title based on nationalization decrees, or that as between the Soviet government and the corporation the latter would not prevail in a New York court.

Thus it is seen that while there is no quarrel with the assertion that recognition acts retroactively to validate the Russian decrees of confiscation, as to property in Russia and rights arising under Russian Law, still this does not mean at all that it must follow as a necessary corollary that they must be enforced in this country as to private property located in this country. Indeed quite the contrary is seen to be the case. The New York cases recognize that while recognition gave the Soviet Government an international standing which it did not have before, recognition or lack of recognition of course is not determinative of the question here involved. In *Dougherty* v. *Equitable Life Assurance Society, supra* (while it was held that insurance contracts made in Russia with an American company by Russian citizens to be performed in Russia according to Russian law would be regarded as subject to Russian law, even though the fulfillment of the obligations of the American insurer were guaranteed, besides its assets and securities found in Russia, by all the property belonging to it), the Court said at page 90: "Recognition does not compel our Court to give effect to foreign laws if they are contrary to our public policy."

Judge CARDOZO writing the opinion in *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248, an action by the assignee of an English insurance company against a Russian reinsurer for losses sustained, said, at pages 255 and 257: "The decree of the Russian Soviet government nationalizing its insurance companies, has no effect in the United States unless, it may be, to such extent as justice and public policy require that effect be given. * * * We think its attempted extinguishment of liabilities is *Brutum fulmen*, in England as well as here, and this, whether the government attempting it has been recognized or not. Russia might

terminate the liability of Russian Corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum."

The theory of the New York decisions is not new or peculiar to the Russian situation. In *Barth* v. *Backus*, 140 N. Y. 230, it was held that the title of a Wisconsin assignee for the benefit of creditors would not be given extraterritorial effect in New York to preclude New York creditors from attaching property in New York. See also, *Marshall* v. *Sherman*, 148 N. Y. 9. Foreign penal laws or those contrary to public policy will not be enforced in New York. See, *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 112.

Under the law and public policy of New York when a corporation is dissolved its assets are not subject to confiscation or escheat. They are considered to be the property of all the stockholders and creditors, wherever they may be, and are to be held for such persons. *People* v. *National Trust Co.*, 82 N. Y. 283, 287; *Shayne* v. *Evening Post*, 168 N. Y. 70; *People* v. *O'Brien*, 111 N. Y. 1; *Matter of Long Sault Development Co.*, 212 N. Y. 1. In *Lord* v. *Equitable Life Assurance Society*, 194 N. Y. 212, 227, it was said: "When the legislature has created a corporation and has given it power to acquire property, it cannot take away the property so acquired without providing for compensation."

(1)

**It Cannot Be Here Contended That the Russian Government Has a Title Akin to That of a Statutory Liquidator**

The title of a foreign liquidator to assets in New York will only be recognized and enforced where it appears that the funds will be dealt with in the interests of creditors and shareholders; and this is, of course, far from being the

case here. In *In Re Waite*, 99 N. Y. 433, 448, it was said: "The titles of foreign statutory assignees are recognized and enforced here (through comity), when they can be without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; *provided also, that such titles are not in conflict with the laws or the public policy of our State.*" (Italics ours.) See also: *Matter of People* v. *City Equitable Fire Ins. Co.*, 238 N. Y. 147, 157; *Martyne* v. *American Union Fire Ins. Co.*, 216 N. Y. 183, 192. Moreover in *Cole* v. *Cunningham*, 133 U. S. 107, 122-123, this Court recognized this rule saying: "The rule in that State is, that by the comity of nations, the statutory title of foreign assignees in bankruptcy is recognized and enforced when it can be done without injustice to the citizens of the State and without prejudice to creditors pursuing their remedies under the New York statutes, provided also that such title is not in conflict with the laws or public policy of the State and that the foreign court had jurisdiction of the bankrupt.". See also *Security Trust Co.* v. *Dodd Mead & Co.*, 173 U. S. 624 629.

Petitioner argues that the Soviet Government had power to and did dissolve the Metal Company, and constituted itself as its successor; that it is settled law that on the dissolution of a corporation, the successor designated by the State of its incorporation obtains title to the corporation's estate wherever situated. This is in effect contending that the Soviet Government has a title here to the deposit in question akin to that of a foreign statutory liquidator that should be recognized. In the first place, as has been seen, it is clear that no title of any foreign liquidator will be given effect where as here it would be so contrary to public policy to do so. But further, *no* analogy of liquidation can here prevail. Here the confiscation of a solvent corporation is in question, which is a far cry from the orderly liquidation of an insolvent corporation. Confiscation is not liquidation, for liquidation implies winding up, and the *settling*

*with creditors.* Judge CARDOZO writing the opinion in *James & Co.* v. *Second Russian Ins. Co., supra,* said at page 257: "The decree invoked by the defendant is not in any true sense a decree of bankruptcy, though even if it were, there would be limits to its extra-territorial validity. A decree of bankruptcy presupposes a distribution of the assets for the benefit of creditors, and this decree is one of confiscation, appropriating the assets for the benefit of the Soviet republic." Here no settling with creditors is contemplated, but rather a seizure, and an accounting by the United States of the amount so seized to the Russian Government.

The so-called succession was by confiscation. It was the very act which our courts say will not be given effect as a means of transferring title in New York. Moreover, the title of a statutory assignee will only be enforced in compliance with, and subject to, the public policy of the forum.

## B

### Because the Amount of the Deposit Here Claimed is Property Localized in New York, New York Law Must Govern

The petitioner seeks to avoid the rule that confiscatory decrees of a foreign power will not be enforced with respect to property or obligations outside of its territorial limits. It argues that the deposit with the Belmont firm in New York was subject to the confiscatory decrees because the depositor was a Russian corporation; that a bank deposit creates a debtor-creditor relationship resulting in an obligation to pay on the part of the bank and a right to receive the amount of the deposit on the part of the creditor, and that the obligation to pay is situated at the place of business of the bank, in this case New York, while the right to receive is situated at the place where the creditor is. The creditor in this case being a Russian corporation, the argument is that its right to receive was situated in

Russia and this right was divested from it and transferred to the Soviet Government, which thereby acquired a valid right under its own law, which would be recognized by our courts.

But if the obligation to pay is situated here, as it is, then clearly our law must apply and not that of Russia. The duty, for the performance of which the debtor is bound, will be discharged by compliance with the law of the place of performance of the promise, which law determines the manner of performance, the time and locality of performance, the person or persons by whom or to whom performance shall be made or rendered, the sufficiency of performance and excuse for non-performance. Restatement, Conflict of Laws, § 358.

Petitioner in its brief argues that Russian law must determine to whom payment should be made (p. 16). The Restatement, Conflict of Laws, is to the contrary.

> "The law of the place of performance of a contract determines the person to whom performance shall be rendered." (Restatement, § 366.)

The tenuous right to receive is really no right in Russia but one to receive in New York, where it is the corollary of the obligation to pay in the State where performance is due. It seems clear on the authorities that if a situs is to be ascribed to a bank deposit, that situs was in New York, as a result of which the State had full dominion, no matter what the residence of the depositor or its representatives. *Pennington* v. *Fourth Nat. Bank*, 243 U. S. 269; *Security Savings Bank* v. *California*, 263 U. S. 282. See also *Richardson* v. *National Bank of India*, 43 T. L. R. 631. In *Security Savings Bank* v. *California*, *supra*, page 285, the Court said,

> "Thus the deposits are clearly intangible property within the state. Over this intangible property the state has the same dominion that it has over tangible property."

There a state law providing, through appropriate procedure, for the payment over of savings deposits in a state banking corporation long unclaimed, to the state as depositary, or by way of escheat, was held not to violate any right of the bank under the contract clause of the Constitution or the due process clause of the Fourteenth Amendment. It did not appear what was the residence of the depositors (see p. 284) and the dominion of the State of California over the deposits was fully recognized.

In the *Pennington* case, *supra*, at page 271, Mr. Justice BRANDEIS said,

> "The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within the State. *Chicago, Rock Island & Pacific Ry. Co.* v. *Sturm*, 174 U. S. 710. It is, indeed, the species of property which courts of the several States have most frequently applied in satisfaction of the obligations of absent debtors. *Harris* v. *Balk*, 198 U. S. 215."

In that case it was held that a state could make a decree for alimony a charge on a bank account of a non-resident defendant.

Under the law of New York a bank account is localized at the place of deposit. *Bluebird Undergarment Co.* v. *Gomez*, 139 Misc. 742; *Murtagh* v. *Yokohama Specie Bank*, 149 Misc. 693. The debt here was created by New York law and was due and payable under New York law, hence it is governed and discharged by New York law. *Zimmerman* v. *Sutherland*, 274 U. S. 253; See also: *Sokoloff* v. *Nat. City Bank*, 239 N. Y. 158, 169, and *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378. In *Matter of Houdayer*, 150 N. Y. 37, 40-41, the court said: "The decedent brought his money into this State, deposited it in a

bank here and left it here until it should suit his convenience to come back and get it • • • conceding that the deposit was a debt, conceding that it was intangible, still it was property in this State for all practical purposes • • • the fund has a situs here because it is subject to our laws."

See also *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193; Conflict of Laws, Restatement, §§ 208, 212, 213, 258.

While, as pointed out by the plaintiff in its brief (p. 17), the term "debt" has the dual correlative meanings of "debt" and "chose in action", we are here interested in the situs of the "debt". A deposit account (the "debt" here) is localized in the state of the depositary, where it was made, where it is due and payable, under whose law its contract is governed, and where the funds constituting it actually are and always have been, and that state is regarded as having dominion over the deposit even as over tangible property within its borders. The obligation to pay the debt here is determined by New York law, as the plaintiff admits, and as *Minor* points out (plaintiff's brief, p. 18), this "corresponds to the *actual* situs of the tangible chattels", and hence must determine that the debt has its situs here in New York. See *Severnoe Sec. Corp.* v. *London and Lancashire Ins. Co.*, 255 N. Y. 120, at page 124. It was said in *Chicago R. I. etc. Ry.* v. *Sturm*, 174 U. S. 710, 716 (a case relied on by the plaintiff): "• • • considerations of situs are somewhat artificial. If not artificial whatever of substance there is must be with the debtor. He and he only has something in his hands." We are not concerned with the intangible right to receive, for whenever property is located in one state, there may be persons elsewhere with rights to receive recognized by other states, but the state wherein the property is actually located will be deemed to have dominion over it. The right to receive may be deemed operative only in respect to the power of the Russian State *in Russia*. Cf. *Clark* v. *Williard*, 294 U. S. 211, 213-214. The question here at issue is not as to enforcement of the

right to receive, but *as* to the obligation to pay, which is to be determined by the laws of this country, the locality of the debtor, which clearly considers the deposit to be located here, and which rejects giving effect to foreign confiscation in respect to it.

If the so-called right to receive is so far to be governed by Russian law, and its transfer by confiscation to give full rights to the assignee, then the right of the forum to govern the obligation to pay would be gone—a result contrary to the authorities and to common sense.

To say that a deposit of cash made in a New York bank, maintained and repayable there, has sufficiently a situs in Russia, so as to compel us to recognize the validity of a confiscatory decree contrary to our every conception of public policy, is carrying fictions to an extreme. It is certainly not the doctrine of our law. When fictions are disregarded it must be clear that in the last analysis the State of New York has full dominion over the account.

If the question as to this deposit account is regarded as one of contract, then the result is equally clear. The deposit was repayable in New York. Matters of performance of a contract are governed by the law of the place of performance. This includes, among other matters the sufficiency of performance and the person to whom performance shall be made or rendered. *Conflicts Restatement, supra.*

Since the amount in question is localized in New York, is property located in New York, the law and public policy of New York must determine the ownership of the amount. *Disconto-Gesellschaft* v. *U. S. Steel Co.*, 267 U. S. 22, 28, where it was said: "But the question who is the owner of the paper depends upon the law of the place where the paper is"; *Burnet* v. *Brooks*, 288 U. S. 378. In *Pennoyer* v. *Neff*, 95 U. S. 714, 722, the court said: "* * * every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence every State has the power to determine for itself * * * and

also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred."

In *Clark* v. *Williard* (292 U. S. 112), 294 U. S. 211 (twice before the court on certiorari), it was held that while a state where there were assets must recognize the title of the Superintendent of Insurance of the state of incorporation as the statutory successor, under the full faith and credit clause of the Constitution, it could refuse to enforce such title as to local assets where against local public policy. The Iowa Superintendent there had to submit to the Montana laws as to Montana assets, and to have his recognized title subordinated to the liens of the executions of local Montana creditors claiming the right to levy in order of filing, even though under Iowa law an assurance of equality of distribution was provided. The Court said (294 U. S., at pp. 213, 214, 215):

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under process of its Courts * * *. He (the Iowa statutory liquidator) must submit * * * to the mandate of the sovereignty that has physical control of what he would reduce to his possession * * * Iowa may not say * * * that a liquidator with title who goes into Montana may set at naught Montana law as to the distribution of Montana assets, and carry over into another state the rule of distribution prescribed by the statutes of the domicile."

Here a sovereign State of the Union, fortified by the "full faith and credit" clause of the Federal Constitution was held to be powerless to interfere with the disposition of the property of one of its corporations by another state where the property in question was situated. It is preposterous to contend that a foreign government, entirely *without* the benefit of such clause, could possibly be in any *better* position; and this case shows that while the state that creates a corporation can dissolve it and can provide to whom

its assets shall pass on dissolution, (a well known and elementary proposition which the United States here asserts in argument), it is an entirely separate and different question as to whether the law of the place where the property is localized and has its situs will allow a disposition of such property so under its jurisdiction contrary to its law and public policy. This case shows that it need not do so.

Suit will not be allowed in a Federal court to circumvent the declared public policy of New York. Really a deposit contract is here concerned, and the law as to a contract is determined by the public policy in force in the state where the contract is to be enforced and performed unless the constitution, treaties, or laws of the United States or general principles of law are different. *Becker* v. *Interstate Business Men's Association,* 265 Fed. 508. "Neither by comity nor by the will of contracting parties can the public policy of a country be set at naught." *The Kensington,* 183 U. S. 263, 269. See also *Kennett* v. *Chambers,* 14 How. 38, 52.

Moreover it was said in *Cooper* v. *Newell,* 173 U. S. 555, 567: "* * * and the courts of the United States are bound to give to the judgments of the state courts the same full faith and credit that the courts of one state are bound to give to the judgments of the courts of her sister states." In *Bank of Augusta* v. *Earle,* 13 Pet. 519, 597, it was said: "When the policy of a State is thus manifest, the courts of the United States would be bound to notice it as a part of its code of laws." One of the powers *not* delegated to the Federal Government is the sole and exclusive jurisdiction of persons and property within a state's territory; in respect to such the decisions of the state court in question must be respected.

The garnishment cases relied on by the Government in reality recognize the same principle, and we are unable to find authority for the proposition that the so-called right to receive of the creditor gives Russia jurisdiction to transfer the title to property in New York.

> "Substituted service on a non-resident by publication furnishes no legal basis for a judgment *in personam*. *Pennoyer* v. *Neff*, 95 U. S. 714. But garnishment or foreign attachment is a proceeding *quasi in rem*. *Freeman* v. *Alderson*, 119 U. S. 185, 187. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power." *Pennington* case, *supra*, at page 271.

Essentially there is no difference here between tangibles and intangibles, for if instead of a bank account the property was a horse or an automobile in New York it might with equal logic be said that the components of the property rights therein were the owner's right to receive and the holder's obligation to deliver up, and that as the owner was Russian his right to receive was a property right which might be dealt with by Russian decree. It seems clear from all the cases that the law is to the contrary.

The cases where choses in action represented by or embodied in negotiable instruments or other similar documents are held subject to the foreign law when they are there situated present no analogy since for many purposes the property is considered to be where the instrument is physically held.

In addition to the dictum in *U. S.* v. *Bank of New York and Trust Company*, in the Circuit Court of Appeals, quoted at pages 19-20 of the Government's brief herein, it must be remembered that the Court also said immediately after the quotation referred to (p. 868),

> "When the executive branch recognized the Soviet Government, the judicial branch became bound to recognize the validity of Soviet decrees *in Soviet territory* from the beginning of the Soviet regime." (Italics ours.)

The Circuit Court of Appeals did not decide that we must give effect to the confiscatory decrees as to property here, since the decision of the case was that the state courts had

jurisdiction of the res and that the Government's suit must fail. If the dictum is to be relied on, it must be regarded as overruled by the decision of the Circuit Court of Appeals in the present case. The Russian decree was clearly not an assignment in the ordinary sense but an expropriation and destruction of all private property rights, and rules of law designed to apply to cases of ordinary assignments have no real application.

It may be so that the effect of an ordinary assignment of a contract right as between the assignor and the assignee is determined by the law of the place of assignment (Restatement, § 350). But the right of the assignee to payment is determined by the law of the place of performance.

> "The law of the place of performance of an assigned contract determines whether the right of an assignee can be destroyed by payment to the assignor." (Restatement, Conflict of Laws, § 353.)

So the law of the place of performance of an assigned contract determines whether payment by the obliger to a second assignee destroys the right to performance of the first assignee (Restatement, § 354).

If this had been tangible property in New York, can there be any doubt that the decrees would be ineffective to give title? Yet there would be what petitioner in its brief calls an assignment good by Russian law. In the same brief there is reference to the statement of the New York court that there is no distinction between the seizure of tangible property and the disposition and canceling of rights to intangible property. (Brief for the United States, p. 37, quoting from the *Dougherty* case.)

The *Guatemala* case (1927, 1 K. B. 669), had nothing to do with confiscation of property by a foreign government. The Court held that an assignment made in Guatemala without consideration, which was invalid by the law of the place where made, would not be recognized in England even though if made there it would have been valid.

In *Hutchison* v. *Ross*, 262 N .Y. 381, the New York Court of Appeals held that the validity of a trust of personal property must be determined by the law of New York when the property was situated there, and the parties intended that it should be administered there in accordance with the laws of the State. The question for the Court was whether conveyances in trust of securities made *inter vivos* should be governed by the same rules as testamentary trusts or by the same rules as other conveyances *inter vivos*. It was urged upon the Court that as the settlor was a non-resident, the question of the validity of the trust must be governed by the law of his domicile, as in the case of testamentary trusts. Reliance was placed on the *Anziani* case cited by the Government here. But the Court refused to extend the doctrine and said of the *Guatemala* and *Anziani* cases,

> "Judicial decisions affecting the situs of choses in action or intangible property not embodied or merged in a mercantile document are not in point. (Cf. *Matter of Anziani*, [1930] 1 Ch. 407, and *Republica de Guatemala* v. *Nunez* [Court of Appeal, 1927], 1 K. B. 669.) We are dealing with a conveyance in trust of documents which in the market-place are treated as property and not merely evidence of property (Cf. *Pierpoint* v. *Hoyt*, 260 N. Y. 26), and consider no other question."

The petitioner argues that the situs of an intangible is not necessarily localized at one place for all purposes, and quotes from the *Severnoe Securities Corporation Case* (255 N. Y. 120, at 123). There a cause of action in favor of a Russian insurance company grew out of transactions in England with a British insurance company having a branch in New York. The surviving directors, less than a quorum, were held to be without capacity to sue in the corporate name in the absence of an emergency, nor to enlarge their powers by making an assignment for the same purpose to someone else. Chief Judge CARDOZO, saying that the situs of intangibles is a legal fiction, stated that there were times when justice or convenience required that a legal situs be ascribed to them:

> "At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions" (pp. 123-124).

While it is true, as stated in the Government's brief, that he went on to say that for the purpose of the case at hand, if not for others, the situs of the chose in action was England and perhaps in Russia, but certainly not here, he continued:

> "The debt is localized in England because there contracted by a British debtor in favor of a foreign creditor doing business in England in conformity with British law" (p. 124).

The Petitioner's argument brings it ultimately to the doctrine of *mobilia sequuntur personam*. This doctrine is another fiction which has become imbedded in the law with respect to decedents' estates. The cases in respect to this doctrine concern the administration of decedents' estates and taxes, succession taxes at the domicile upon estates of deceased persons. The rule is not that the property of a deceased person in a foreign jurisdiction can be taxed at the domicile, but rather that the tax is one of privilege of succession imposed on the allowance by the law of the domicile of the enjoyment of a transfer by law or intestacy. The tax is on the privilege of succession, not upon the property itself. It has no real application to the case at bar. *Blodgett* v. *Silberman*, 277 U. S. 1, relied on by Petitioner dealt with the imposition of a succession tax on a decedent's estate. See also *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204, 214. These cases have no application to the dissolution of a corporation, nor is there any question of succession at the domicile here, except by reason of confiscation.

The doctrine at best must yield to established facts of legal ownership, actual presence, and control, and to the facts and circumstances in justice requiring it. *De Ganay* v. *Lederer*, 250 U. S. 376, 382; *Baker* v. *Baker, Eccles & Co.*,

242 U. S. 394, 401; *Safe Deposit & Trust Co. of Baltimore* v. *Virginia*, 280 U. S. 83, 92, 93; *Colorado* v. *Harbeck*, 232 N. Y. 71. There can be only one situs here. Cf. *First National Bank* v. *Maine*, 284 U. S. 312, 326.

Certainly, no such extension is found in the *Oklahoma Gas Case*, cited by the Government for the proposition that the dissolution of a corporation cannot be distinguished from the death of a natural person in its effect. In that case there was a motion to substitute an alleged successor for the dissolved corporation, which was denied for lack of information given by the motion papers, without prejudice to renewal on a fuller showing. Whatever may be the effect of the termination of existence of a corporation where statutes do not provide, as is usual, for orderly liquidation for the benefit of creditors and stockholders, the doctrine can have no application to the question of confiscation of property. It would be an anomaly, if doctrines useful for certain purposes, were allowed to apply to circumstances which were not, and could not have been, in the minds of a court deciding cases on other facts wholly unrelated to those at bar.

We are not dealing here with the case of a voluntary assignment. Moreover, an involuntary assignment even for the benefit of creditors under the laws of a foreign state, is not to be enforced in the state of the forum where to do so would cause conflict with the rights of creditors under the laws of the forum. *Clark* v. *Williard*, 294 U. S. 211.

In the *Russian Reinsurance* case, 240 N. Y. 149, referred to by the Government, the Court also said,

> "If it is urged that by so doing we may enable the Soviet government in case of recognition by the State Department to assert here an unjust claim based upon confiscation, the answer is that the responsibility rests upon that branch of our government to determine in the first instance whether and upon what terms the Soviet government should hereafter be recognized and the courts will then determine, subject to any rights granted by treaty, whether they will enforce any claim asserted by that government" (p. 168).

Whatever the effect to be given upon diplomatic recognition of the Soviet Government as *de jure*, it is inconceivable that the title to the cash in bank in an American banking house can be transferred from one person to another by a confiscatory decree of a foreign power.

## C

## Comity May Not Be Here Extended to Enforce Soviet Decrees of Confiscation Repugnant to the Public Policy of New York, Nor to Enforce a Foreign Penal Law

The statutes of a foreign state can in no case have any force or effect in another state *ex proprio vigore*. *Matter of Accounting of Waite*, 99 N. Y. 433, at page 448. In *Hilton* v. *Guyot*, 159 U. S. 113, 163, it was said: "No law has any effect of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have called the comity of nations." When a foreign law sought to be enforced in this country offends against public policy, comity must then give way to public policy and the foreign law will not be enforced. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 290; *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160; *Rose* v. *Himely*, 4 Cranch 240; *The Appollon*, 9 Wheat. 362. A state will not enforce the penal laws of a foreign state.

The Restatement of the Law of Conflict of Laws says: "610. No action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interests." See also Sections 611, 612. To recognize a title to property in this country as a result of Russian decrees of confiscation would be giving effect to laws of Russia enacted to further its own special governmental interests and policy.

Moreover, it has been held that in case of any doubt a statute should be construed as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power as all legislation is *prima facie* territorial. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357. See also: *Hamilton* v. *Accessory Transit Co.*, 26 Barb. 46; *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404, 409 (aff'd 268 U. S. 552).

Since it is clear that the enforcement of the Soviet decrees of confiscation would be entirely repugnant to and offend the public policy of the State of New York comity may not be resorted to, and such decrees should not be enforced. The title of a foreign statutory assignee will be recognized only by comity, and only when in harmony with the established policy of the law of the forum. *Cole* v. *Cunningham, supra; Security Trust Company* v. *Dodd Mead & Co., supra.* The law of the domicile must yield when it is shown that it is contrary to the law and policy of the state where property affected is actually located. *Keller* v. *Paine*, 107 N. Y. 83, 89; *Warner* v. *Jaffray*, 96 N. Y. 248, 255; *Dearing* v. *McKinnon, etc. Co.*, 165 N. Y. 78, 87; *Hervey* v. *R. I. Locomotive Works*, 93 U. S. 664, 671.

It is penalizing creditors and stockholders of a corporation to seize their property and destroy their rights without any provision for compensation. Certainly the Soviet Government is favored by the acquisition of property for which it has paid out nothing. See Sec. 610, *Restatement of the Law of Conflict of Laws.*

In *Banco De Vizcaya* v. *Don Alfonso*, (1934), 151 L. T. R. 499, it was held that a Spanish decree that purported to confiscate the property of the former King of Spain and appropriate it to the Government of Spain was a penal law and would not be enforced by the English courts for that reason. The Court said, at page 501: "* * * the penalty imposed is seizure by the State for its own benefit of all the defendant's properties, rights, and grounds of action. * * *"

It is for the courts of the forum to determine whether a law is penal or not, and Executive acceptance of the purported assignment here cannot be considered as negativing the penal nature of the Soviet decrees of confiscation on which the United States must rely for title under the purported assignment. These Soviet decrees were penal in nature and as such not enforcible in the forum.

## D

## The Law of New York Must Be Applied Here as the Defendants are Executors Subject to the New York Surrogates' Court for the Administration of the Amount Claimed

The deposit here is held by executors who are accountable to the Surrogates' Court of New York. This has important consequences. A Federal court may not interfere with a state court's jurisdiction or control of a *res* under the administration of a state court, although suits may be brought *in personam* in a Federal court to enforce a personal liability in respect to a *res* subject to the administration of a state court. In such a case the suit merely serves to establish a debt or a right to share in the property in question. But this adjudication in the Federal court must not disturb the control of the state court. *Byers* v. *McAuley*, 149 U. S. 608; *Waterman* v. *Canal—Louisiana Bank Co.*, 215 U. S. 33; *U. S.* v. *Bank of New York and Trust Company*, 296 U. S. 463; *Commonwealth Trust Co. of Pittsburgh* v. *Atwood*, 78 F. (2d) 92, 94. When such a claim has been established in a Federal court as to existence, amount and status, it leaves the district court and enters the surrogate's court of the state, where it takes its place and share of the estate as administered by that court.

But the suit here is not brought against the executors *individually* for matters arising out of their duties. *Watkins* v. *Madison County Trust & Deposit Co.*, 24 F. (2d) 370. It

is brought against them *as executors*. The action brought is *in personam*, but the claim is not for a personal liability, as for a tort. It is sought to claim a deposit held by persons in their capacity as executors appointed by the Surrogates' Court of New York. It is clear that all that can result from this suit is the establishment of a debt or right to share in the property in question *under the administration of the Surrogates' Court of New York. Yonley* v. *Lavender*, 88 U. S. 276; *Byers* v. *McAuley, supra; Waterman* v. *Canal—Louisiana Bank, supra.*

It was said in *Wickham* v. *Hull*, 60 Fed. 326, 330: "The judgment simply determines the existence of a claim against the estate, and adjudges the amount thereof, 'but the debt thus established must take its place and share of the estate as administered by the probate court, and it cannot be enforced by process directly against the property of the decedent' *Byers* v. *McAuley*, 149 U. S. 620." See also: *Watkins* v. *Eaton*, 183 Fed. 384, 388; *McClellan* v. *Carland*, 187 Fed. 915, 920; *J. Elwood Lee Co.* v. *Grace Hospital*, 206 Fed. 994; *American Baptist Home Mission Society* v. *Stewart*, 192 Fed. 976, 979; 1 *Cyc. Federal Procedure*, p. 202, p. 231, *et seq.*; 15 *Corpus Juris*, p. 1168; *Harrison* v. *Moncravie*, 264 Fed. 776, 779. Cf. *Tussing* v. *Central Trust Co.*, 34 F. (2d) 312, 315, and *Bedford Quarries Co.* v. *Thomlinson*, 95 Fed. 208. The United States cannot avoid the law of New York by suing in its own court when the decisions of its own court are clear that any claim established therein in respect to an estate in administration under a state court must go back to such state court for enforcement.

This being so, the New York rules of decision should apply in the Federal Court. Otherwise a plaintiff might by choice of court alone be able to secure rights in respect to funds held as officers of a court of a State not allowed by the law of that State. While a non-resident creditor of an estate may sue the resident executor in a Federal Court and obtain a judgment, he cannot issue execution on the judgment but must go to the probate Court for payment.

*Yonley* v. *Lavender,* 88 U. S. 276, 279-280. Of course, the probate Court will be governed by the law of the State whose Court it is. In the case at bar the Surrogate's Court could not give effect to the Soviet decrees of confiscation without violating the declared law and policy of the State of New York.

It has been said that in a suit such as the instant one—"the National Courts administer the laws of the state of the domicile of the decedent, and in the enforcement of these laws they uniformly follow the rules and decisions which govern the state tribunals in all cases in which these rules and decisions violate no right secured by the constitution or laws of the nation. *Aspden* v. *Nixon,* 4 How. 467, 498, 11 L. Ed. 1059; *Walker* v. *Walkers Ex'r.,* 9 Wall. 743, 754, 19 L. Ed. 814; *Yonley* v. *Lavender,* 21 Wall. 276, 22 L. Ed. 1043; *Byers* v. *McAuley,* 149 U. S. 609, 615, 13 Sup. Ct. 906, 37 L. Ed. 867; *Security Trust Co.* v. *Black River National Bank,* 187 U. S. 211, 227, 237, 23 Sup. Ct. 52, 47 L. Ed. 147." *Schurmeier* v. *Connecticut Mutual Life Ins. Co.,* 137 Fed. 42, 44. See also *Alice E. Mining Co.* v. *Blanden,* 136 Fed. 252, 254. The petitioner's argument, based on the B. & W. Taxi Co. case (276 U. S. 518), that Federal courts are not necessarily bound by the decisions of the State courts as to a matter of public policy of the State, is not applicable here, as there is no reason to suppose that these decisions are unsound. On the contrary, they are supported by fundamental principles of the common law.

## E

### The Decisions in England and Other Countries in Which This Question Has Arisen Are in Accord With the Law of New York

The English Courts have decided that the confiscatory decrees of the Soviet Government do not affect private property outside of Russia at the time of the decrees.

In *The Jupiter* (No. 3), (1927) P. 122 (aff'd Ct. of Appeal, 1927 P. 250, 255), the Jupiter was one of a fleet of boats registered at Odessa in the Ukraine. This fleet left Odessa before the Russian confiscatory decrees became effective in respect to the fleet, proceeded to Marseilles in France and there operated. Later the French Courts appointed an administrator for the fleet. The Master of the Jupiter sailed the boat to England and delivered it there to a representative of the Soviet Government who purported to sell it through the instrumentality of an English company to an Italian company. The Court of Appeal held that the Jupiter could not be claimed by the Soviet Government and that the title of the French administrator would be recognized since the confiscatory decrees could not affect property actually located in Russia at that time. The lower Court said (p. 144): "If the Jupiter was not within the territory of the R. S. F. S. R. I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognized in all the cases." On appeal LAWRENCE, L. J., said, at page 255: "In my opinion the determining factors in this case are: (1) That the nationalizing decrees of the U. S. S. R. do not operate on property outside the territory of that Republic, whether such property belonged to a Russian citizen or not; (2) that the Jupiter was not at the date when those decrees were promulgated, and has not since been within the territory of that Republic; and (3) that at the time when the Jupiter was handed over by the Master to the U. S. S. R. she was in the lawful possession of the French provisional administrator." It may be noted that our case is a stronger one for the denial of extraterritorial effect to foreign confiscatory decrees, because a vessel such as the "Jupiter," is for some purposes deemed a part of the territory of the country to which she belongs. *U. S.* v. *Rodgers,* 150 U. S. 249.

See also, *Russian Bank for Foreign Trade,* (1933), Ch. Div. 745, 767, where the Court said, "If the debt was primarily recoverable in London, I am of opinion that it was

not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable. * * * The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. * * * Moreover, it is evident that our courts have never entertained the view that a debt incurred here by a foreign corporation permitted to carry on business here under the English law can be discharged by a foreign statute."

See also *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte de Mulhouse* (1925) A. C. 112, 125; *Lecoutourier* v. *Rey* (1910) A. C. 262; *First Russian Insurance Co.* v. *London & Lancashire Ins. Co., Ltd.* (1928) Ch. Div. 922; *Sedgwick, Collins & Co.* v. *Rossia Ins. Co. of Petrograd,* 1926 K. B. 1, 15 (affirmed, 1927 A. C. 95).

In the case of *Luther* v. *Sagor,* (1921), 3 K. B. 532, 545 the court said, "The question before the court is as to the title to goods *lying in a foreign country* * * *" (italics ours), and on this ground this case was distinguished in the more recent case of *The Jupiter, supra* (1927 P. at p. 140). The case of *Lazard Brothers* v. *Midland Bank* (1933) A. C. 289, cannot be relied on by the plaintiff. Here it was expressly stated by Lord Wright, at page 302: "No question is here involved of the extra-territorial effect of legislation, confiscatory or otherwise * * * Nor do I think it necessary to express any opinion about the status of assets in England, a matter not in these proceedings." In England the closest the Soviet government has yet come to recovering property claimed located in England is in the cases of *Union of Soviet Socialist Republics* v. *Onou,* 69 Sol. J. 676 (K. B. May 13, 1925), and *Union of Soviet Republics* v. *Belaiew,* 42 T. L. R. 21. But here no question of confiscation was concerned; the property claimed was clearly that of the

Russian government in each case. In the first case it was only held that the Soviet government was entitled to state records and archives located in England of former Russian governments. In the second, that the Soviet government was entitled to papers and documents of its predecessor government in the hands of a custodian in England.

The law of other nations is in accord. See, *Nebolsine, The Recovery of the Foreign Assets of Nationalized Russian Corporations,* 39 Y. L. J. 1130. See, *Ginsberg* v. *Deutsche Bank,* (1928, Justice WOCHENSCHRIFT 1232, 1233, Kammergericht, Berlin), where the court said: "The assets of the nationalized Russian businesses situated abroad do not belong to the Russian State"; *Council of Russian Orthodox Community in Copenhagen* v. *Legation of R. S. F. S. R.,* (1925-26, Ann. Dig. of Int. Law cases 24, Sup. Ct. Denmark); *Wilbuschewitz* v. *Zurich* (1926, 53 Clunet 1110, 1113, 1925-1926 Ann. Dig. of Int. Law cases, 96, Trib. Fed. Switzerland); *Etat Russe* v. *Ropit,* (1925, 52 Clunet 391; 53 Clunet 667, 1926; aff'd 1928 Cour de Cassation, 55 Clunet 674, France). In this case last cited the highest court of France said: "No one in France may be compelled to surrender his property, unless it be for public use and in consideration for a just and previous compensation; * * * this rule, inserted in our codes and asserted in our successive constitutions, is one of the fundamental bases of our social institutions; * * * it cannot be made to yield before the stipulations of foreign legislation without profoundly disturbing the order established on the territory of the Republic." "Respect for property and for the inviolability of the rights property gives birth to," were deemed to preclude the French courts from giving effect to Russian decrees purporting to appropriate and nationalize private property located in France. The Court here might well have been deciding under the doctrine of the Fifth Amendment of *our* constitution. It may be added that in all of these cases, except the Swiss case, the question was decided after the recognition by Russia of the country concerned.

In the more recent case of *Cockerill* v. *La Union et Phenix Espagnol,* Cour d'Appel de Paris (12.23.30), 58 Clunet 400 (affd. 61 Clunet 662), the court said: "The French courts will not give effect in France to the legislative acts of a foreign Government even though recognized when they are contrary to French public policy and will not give any effect to those decrees which in opposition to the principle contained in Article 545 of the Civil Code, pronounce the pure and simple confiscation of private property. From which it follows that the Soviet decrees cannot invest the Russian state with the rights which the Russian Transport Company possessed in France." See also, *Habicht, The Application of Soviet Laws and the Exception of Public Order,* 21 Amer. Journal of International Law, 238.

## F

## It Is a Universal Principle of Law that Foreign Decrees of Confiscation Will Only be Recognized As Far As Property Actually Located in the Territory of the Confiscating State is Concerned

Decrees of nationalization, appropriation and confiscation are not given effect except as to property actually located in the jurisdiction of the country passing such decrees. While recognition may act retroactively to validate acts performed and decrees enacted prior to recognition by the nation later recognized, it does not validate acts performed prior to recognition which purport to affect private property rights *outside the borders of the territory of the nation so subsequently recognized.* See: *H. T. Cottam & Co.* v. *Commission Reguladora,* 149 La. 1026, 90 So. 392, 394-395. While to some extent tax laws of the United States are given what may be deeded extra-territorial effect, it is one thing to tax; it is wholly another to take all of the property out of which the tax arises. In *Underhill* v. *Hernandez,* 168 U. S. 250, 253 it was said that the courts of this country

would not sit in judgment of the acts of another government "done within its *own* territory." (Italics ours.) In *Rose* v. *Himely*, 4 Cranch 240, 278, it was said: "A power to seize for the infraction of a law is derived from the sovereign, and must be exercised it would seem within those limits which circumscribe the sovereign power." Cf. *Baglin* v. *Cusenier Co.*, 221 U. S. 580, 596-597; *Second Russian Insurance Co.* v. *Miller*, 268 U. S. 552, 559-560. In turn, the laws of the United States itself will not be interpreted to allow a seizure in another country of property located there. *The Apollon*, 9 Wheat, 362, 367.

In *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d) 396, 401, Judge MANTON said: "It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition. Acts theretofore performed outside of its own territory cannot be validated by recognition." See also *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404.

In *Frenkel & Co.* v. *L'Urbaine Fire Ins. Co.*, 251 N. Y. 243, where French law forbade the performance of contracts entered into between Germans and Frenchmen, it was held that effect would not be given in this country to such a confiscatory mandate of a foreign power. See also, *Holzer* v. *Deutsche Reichsbahn Gesellschaft*, 159 Misc. 830. In *Hamilton* v. *Accessory Transit Co.*, 26 Barb. 46, 50 a decree of the Nicaraguan Government purported to annul and abolish a Nicaraguan Corporation. It was held that the decree was an exercise of despotic power, and was a complete nullity as to property in the United States, the court saying: "The decree thus made can have no effect, except as to property that might be actually grasped by the power that issued it. Its main object was (on its face) to seize the property of the company. Certainly our courts would not aid in that part of it, except that if the property actually within that state were seized there, and the title there lawfully transferred, the transfer of such property would be sustained here."

(1)

**Confiscation Involves More Than the Regulation of the Internal Relations of a Corporation**

Of course it is clear that we are not dealing here with the dissolution of a corporation in the sense in which we understand that term. Dissolution to us means, besides termination of the corporate existence or its quasi termination, where, as frequently happens, it is kept alive for the purposes of winding up, an orderly liquidation of assets for the benefit of creditors and stockholders, quite different from the destruction of the corporation, the confiscation of its assets, and the deprivation of the rights of its beneficiaries. Cases dealing with orderly liquidation have nothing in common with what happened here. The Soviet Government did not dissolve the Metal Company and constitute itself as successor in the sense in which those terms are familiar to us. It is not like the Superintendent of Insurance upon liquidation of a defunct insurance company nor like a statutory receiver of the assets of a failed corporation nor like the trustees in dissolution of a company whose corporate existence has expired. All of these are familiar processes of civilized law with which the courts know how to deal. Far different is the enforced destruction of living rights or the confiscation of property by force without compensation. That Russian law may govern the legal relations of the members of a Russian corporation to the corporation and to each other does not answer the question in this case. The confiscation is not local in Russia as here urged and more than the regulation of the internal corporate relations is concerned. *Canada Southern Railroad Co.* v. *Gebhardt*, 109 U. S. 527, is not in point. A similar argument was rejected by this Court in *Second Russian Insurance Company* v. *Miller*, 268 U. S. 552. The Court said (p. 560),

"Nor does *Canada Southern Ry. Co.* v. *Gebhardt*, 109 U. S. 527, relied upon by appellant, support the contention. That case only laid down the doctrine recently affirmed by this Court (*Modern Woodmen of America* v. *Mixer*, 267 U. S. 544) that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property. The Russian ukase however did not purport to regulate the internal relations of the corporation to its members or lien holders. By its terms it is applicable indiscriminately to individuals and all classes of associations and corporations, and apparently undertakes to deal with contracts of every kind. It cannot be brought within the purview of the rule established in *Canada Southern Railway Co.* v. *Gebhardt* and *Modern Woodmen of America* v. *Mixer*, *supra*."

In *Canada Southern Ry. Co.* v. *Gebhardt*, 109 U. S. 527. it was held that Canada could validly enact that the action of a majority of bondholders of a Canadian corporation should bind a minority in the United States as to an alteration of security in a reorganization of bonds of a Canadian mortgage. The statute in question merely permitted a necessary adjustment of the security; it was not appropriated by the state itself stepping in to wipe it out entirely. Moreover the court there took care to point out (p. 537), that the question was in respect to "security on a mortgage of property * * * situated entirely within the territory of a foreign government." The doctrine of this case, then, is only to the effect that a corporation will be considered discharged from liability everywhere only when it acts under proper laws of the state of its incorporation to change its powers and obligations in respect to a real regulation of its internal relations. In our case there is no question of the corporation acting under proper laws, but rather an intervention of the state of incorporation itself to appropri-

ate; in our case there is no question of only the readjustment of rights, but rather they are wiped out entirely by outright confiscation; and in our case the property concerned is situated not within, but outside the state of incorporation. Thus the principle of the *Gebhardt* case is clearly inapplicable here.

Whether the Metal Company is extinct or has an existence or what the powers of the sovereign may be with respect to its internal relations is not the issue. So far as the opinion of the Circuit Court of Appeals in the earlier case (77 Fed. 2nd 866) may be of importance in view of its decision, it can scarcely be relied on by the Government in this case in view of the decision of the same Court here. It may be granted that the decrees were effective in Russia to extinguish the corporate existence of the Metal Company, but decrees so operating in Russia cannot be considered as having any extra-territorial effect as to property in other countries.

The last sentence of paragraph VII of the Second Amended Complaint in the case at bar alleges as follows:

> "The said duly enacted laws, decrees, enactments and orders of the Russian State, including the said decree of June 28, 1918, did not provide for payment of the claims of creditors of the Metal Company except for the payment of salaries and wages to employees of the Metal Company, and did not provide for payment of compensation to the stockholders of the Metal Company upon the nationalization and appropriation of all of its property and assets" (R., p. 4).

## POINT II

### Public Policy is Opposed to the Plaintiff's Contentions.

The question in this case is whether the United States, as the purported assignee of a foreign government claiming ownership by confiscation of a private bank deposit in New York, is entitled to recover the amount of the deposit from

the bank. This is a question of the title to private property. It is not one of foreign relations or of the action of the Executive in his proper sphere. It is essentially a question of State law. The State law says that the title to property within the State, including cash deposited in banks there, may be transferred or assigned to an assignee and the assignee may recover the deposit from the bank under certain circumstances. None of these circumstances include an alleged assignment based on the confiscatory decree of a foreign power. In this respect the law of New York is probably no different from that of any other State. If this be so, it is as much the duty of the federal courts as it is of the State courts to so declare. If there is a separate federal common law that law is based on the customs, laws and rules of decision of the common law. The common law in its approach to questions of the conflict of laws is territorial. The jurisdiction of a state or nation over property within its borders is recognized, and in proper cases will be enforced in the forum. In the same way the forum insists upon the recognition of its right to lay down the rules governing transactions with respect to property within its territorial limits. As we have shown, the State within which a bank deposit is made and remains has full dominion over that property. American law is here involved and not Russian law. The cases cited by the petitioner for the proposition that the New York courts recognize the confiscatory decrees are cases where the property was in Russia or the contract was there to be performed. Recognition in such cases follows the usual territorial rule which is a part of our own law.

When, however, an American court is asked to give effect to confiscatory or penal laws of another nation contrary to our own laws, constitutions, public policy and sense of justice, the line must be drawn. Otherwise no property would be safe and no owner or holder of property here would be protected from foreign dictation. It is in the

sense of its relation to private property that we refer to the public policy of the state and nation. In that sense it is clear first, that our public policy must prevail, and second, that it prohibits recovery by the plaintiff in this case.

## A

### The Public Policy of the United States is Opposed to Recognition of the Plaintiff's Claim.

The public policy of the United States is to be found in the Constitution and the laws and the course of administration and decisions. *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, at page 655. See also *Mertz* v. *Mertz*, 271 N. Y. 466, 472.

In *People* v. *Hawkins*, 157 N. Y. 1, 12, it was said,

> "The courts have often found it necessary to define its (public policy's) juridical meaning, and have held that a state can have no public policy except what is to be found in its Constitution and laws."

The fundamental conceptions of our public policy are expressed in the Fifth Amendment, which declares,

> "• • • nor shall private property be taken for public use without just compensation."

The public policy of the United States itself forbids giving effect to confiscatory decrees of a foreign power purporting to appropriate and nationalize property located in this country. Chief Justice MARSHALL long ago said: "The sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled." *U. S.* v. *Perchman*, 7 Pet. 51, 87. See also: *Miller* v. *United States*, 11 Wall. 268, 310. In *Ware* v. *Hylton*, 3 Dall. 199, 255, 281, it was said: "By every Nation, whatever is its form of government, the confiscation of debts has long been considered disreputable."

And this was stated in the very early and formative days of our country, in 1796. HYDE (*International Law*, Sec. 623) says: "Confiscation of debts is considered a disreputable thing among civilized nations of the present day." See also *Williams* v. *Bruffy*, 96 U. S. 176, 186-189, and *Hanger* v. *Abbott*, 73 U. S. 532, 536, 539, where it was said: "Individual debts, as a general remark, are no longer the subject of confiscation." Cf. *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 433.

In addition to the Fifth Amendment with its effect upon the United States, the Fourteenth Amendment provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The Constitution of the State of New York provides that no person shall be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without just compensation. Article 1, Section 6. Similar provisions are contained in the Constitutions of most or all of the States. The historic background of the Bill of Rights is too well known to require extended discussion.

The State of New York, through its legislature, has declared in effect that these decrees shall have no extraterritorial effect or validity as to property, including debts, within the State or obligations owing to the foreign corporation from persons, firms or corporations residing, sojourning or doing business in the State. (L. 1936, Chapt. 917, Sub. Div. 19, June 1936.)

In the face of the evidence of the public policy of the State and nation, it is difficult to see how the plaintiff can argue that the enforcement in this country of the Soviet decrees is not contrary thereto.

That argument is based upon the proposition that the public policy of the United States in the matter of foreign relations is to be determined by the Executive under the

Constitution. With that proposition in its proper application we have no quarrel. It does not apply here, however, because in the first place, there is no warrant for the assumption that the Executive in the performance of his functions can deprive anyone of his property, or confiscate private property, or by his acceptance of the alleged fruits of confiscation of another power enrich the United States at the expense of private persons by taking their property. The effect of confiscation is precisely as drastic where the United States sues as the assignee of the confiscating power as where it attempts directly to confiscate private property itself.

**B**

**Acceptance of the Purported Assignment by the Executive Does Not Here Determine Our Public Policy.**

The intimation that the Executive Department has declared the public policy of this country by the acceptance of the purported assignment would mean that by such acceptance he could strip from the legislature or the courts their proper powers of determination. Judge COXE said, in the District Court, in *United States* v. *Bank of New York and Trust Company,* 10 Fed. Supp. 269, 272, in respect to this very purported assignment,

> "The suggestion of the government that the Litvinoff assignment is not open to judicial construction requires little comment, for clearly where private rights are concerned, the mere assertion of the government that suit should be commenced does not preclude the courts from determining as a judicial matter the true meaning of the instrument involved."

Judge SWAN said, in the Circuit Court of Appeals below, in the present case,

> "Recognition permits Russia to resort to our courts and have its rights adjudged by the same principles as

> apply to other litigants. It expresses no policy as to what those principles are. Nor can the assignment and the bringing of suit give the assignee any greater right than the assignor had."

See also *License Tax* cases, 5 Wall. 462, 469; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340.

As an expression of public policy the Constitution cannot be overriden by an attempted Executive confiscation. *Brown* v. *U. S.*, 8 Cranch 110, 123, 127, 128. A treaty cannot change or violate the Constitution, and even the treaty power will not allow the Executive Department to authorize what the Constitution forbids. *The Cherokee Tobacco*, 11 Wall. 616; *Geofroy* v. *Riggs*, 133 U. S. 258, 267. See also *In Re Beale*, 2 Fed. Supp. 899 (aff'd 71 F. [2d] 737). Executive acceptance here, even had it been within the treaty power could not have determined public policy contrary to the Constitution. As the Executive cannot confiscate property, this cannot be accomplished indirectly by accepting title to property in this country based on confiscation. The exhibits of the United States, 4, 5 and 6, attached to the Second Amended Complaint (R., pp. 14, 15), cannot take away from the courts the question of public policy here concerned. Those exhibits are self-serving and ineffective statements by an assignee. The State Department may be asked as to *matters of fact*, including recognition, particularly within the knowledge of the Department. *Underhill* v. *Hernandez*, 168 U. S. 250, 253; *Jones* v. *U. S.*, 137 U. S. 202, 216; *In Re Baiz*, 135 U. S. 403; *Ex parte Hitz*, 111 U. S. 766. But matters of intention and interpretation are entirely different. It is for the courts here to construe the purported assignment insofar as it affects rights to private property in this country, once the facts connected with it have been made clear, by a reference to the State Department if necessary.

Even a treaty is open for judicial construction; much more so should be a mere agreement attempting to affect

private rights. And as in the case of a treaty, it must not be construed to impair security to private property. Private rights remain the same after treaties negotiated between nations as before.

In *Strother* v. *Lucas*, 12 Pet. 410, 438, it was said: "No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would, without express stipulation, have conferred, would seem to be admissible further than its positive words require." On a transfer of property from one sovereign to another, for example, public property may pass, but private property will remain undisturbed, together with the laws protecting it. *Chicago R. I. & P. R. Co.* v. *McGlinn*, 114 U. S. 542, 546; *Coffee* v. *Groover*, 123 U. S. 1, 9; *U. S.* v. *Percheman, supra*, at page 87; *Vilas* v. *City of Manila*, 220 U. S. 345, 357; *U. S.* v. *Moreno*, 1 Wall 400; *Williams, Confiscation of Private Property of Foreigners Under Color of a Changed Constitution*, 5 Amer. Bar Assoc. Journal, 152, 162. In *Tucker* v. *Alexandroff*, 183 U. S. 424, 437, it was stated that treaties should be construed "without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."

The petitioner's brief says that this Court will give effect to the decrees of foreign governments as to property within their territories whether or not confiscatory. But neither this nor *Luther* v. *Sagor* (1921, 3 K. B. 532), answers the question. In that case, the goods were located in a foreign country and the case was distinguished in *The Jupiter* (1927 P. at p. 140), on that ground. The fact that the right claimed by the United States was acquired by virtue of an assignment forming part of an international agreement can have no effect when we are dealing with private property. Neither the Executive nor anyone else can confiscate such property.

C

**Recognition of Russia by the United States Does Not Change the Principles Here Involved.**

The petitioner further argues that by recognition of the Soviet Government and the acceptance of the Litvinoff assignment, the Executive has declared in favor of the enforcibility of the right herein asserted. Aside from the question as to the proper interpretation of the assignment, and whether it was intended to include private deposit accounts in this country, it seems clear that neither recognition nor acceptance can affect the questions here presented in the face of the established public policy of the state and nation. Both the *Vladikavkazsky* and *Dougherty* cases were decided after recognition. To repeat what Judge CRANE said in the *Dougherty* case, *supra,* recognition does not compel our Court to give effect to foreign laws if they are contrary to our public policy. *U. S.* v. *Curtis Wright Export Corp.* is scarcely in point. That involved the question whether Congress had unlawfully delegated power to the President in the Joint Resolution of 1934, which was followed by a proclamation of the President thereunder, making it unlawful to sell arms to countries engaged in armed conflict in the Chaco. In view of the long series of embargo statutes referred to by the Court, there was found to be sufficient warrant for the discretion vested in the President.

In *Doe* v. *Braden,* 16 How. 635, 636, also referred to by the Government, the Court said at pages 658-9:

> "It was a part of the territory of Spain, and in her possession and under her government, until the ratifications of the treaty were exchanged. And until that time the rights of the individual owner, and the extent of authority which the government might lawfully exercise over it, depended altogether upon the laws of Spain."

Nor did the Litvinoff negotiations settle the claims of our citizens against the foreign government. On the contrary,

they failed to do so. That they were or were intended to be a step in the settlement of international claims cannot give the assignee any higher rights than were possessed by the assignor.

Clearly, the recognition of the Soviet Government had no effect on the question here presented. As the Court of Appeals said in *Vladikavkazsky Railway Co.* v. *New York Trust Co.*, 263 N. Y. 369, 379:

> "The fact that the present Russian government was not recognized was not the basis of our refusal to give effect to its decrees nationalizing corporations and confiscating their property. * * *
>
> "Prior to recognition we clearly intimated that our decision would have been the same if at the time recognition had been granted."

The difference between the true functions of the Executive and the Courts is well set forth in *Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149, 168:

> "The responsibility rests upon that branch of our government (the State Department) to determine in the first instance whether and upon what terms the Soviet government should hereafter be recognized, and the courts will determine * * * whether they will enforce any claim asserted by that government."

The question of public policy here is for the Courts to decide, and this function of the Courts cannot be taken away. *Jones* v. *Meehan*, 175 U. S. 1, 32.

While recognition of the Soviet Government permits it to resort to our courts and to have its rights adjudged by the same principles as applied to other litigants, it expresses no policy as to what those principles are. This is clearly stated by the Court below, which added that the assignment and the bringing of suit gave the assignee no greater right than the assignor had.

> "Confiscation of property within the United States is precluded by the Fifth Amendment to the Constitu-

> tion. * * * If the public policy of the United States is material, it would seem clearly adverse to a claim based on the Russian decree" (R. p. 25).

The petitioner now says that the Fifth Amendment has no application here; that it applies in terms only where there is a taking by the United States, and here that there is no taking from the Belmont firm, which is under obligation to repay the amount of the deposit, and that the Bank cannot set up the claim of a violation of the Fifth Amendment where its property is involved. But this does not answer the question. The true importance of the Fifth Amendment, as already pointed out, is as evidence of the law on this question of the conflict of laws and of the public policy of the State and Nation with respect to an attempted enforcement of foreign confiscation of property here. Obviously the enforcement of the confiscation is contrary to that policy. Probably, it is contrary also to the constitutional guarantee, and alien friends are entitled to the protection of the Fifth Amendment as well as citizens. See *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481. The language of the Court here is significant (p. 491):

> "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for private use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments."

See also *Burnet* v. *Brooks*, 288 U. S. 378, 400; *Deutsche Bank* v. *Cummings*, 83 F. (2d) 554, 557, 564, 565.

There is no question of confiscation by the United States as a war measure. See *Stoehr* v. *Wallace*, 255 U. S. 239, 242; *United States* v. *Chemical Foundation*, 272 U. S. 1; *Miller* v. *United States*, 11 Wall. 268, 304, 310. Private

property cannot be taken without just compensation, and the Constitution certainly will not allow the indirect performance or consequence of a prohibited act.

Not only is the alien protected in his rights and property, protection which is worthless if his depository is called upon to pay to someone else, but the Bank is entitled to protection from claims of those who cannot establish a good title to the deposit account.

As the petitioner has said, this is an action at law. In such an action, the plaintiff is not entitled to recover without first showing the validity of its own claim.

The mere fact that the United States is suing does not establish for itself any freedom from the authority opposed to the contention it must make here. *U. S.* v. *The Thekla*, 266 U. S. 328, 339; *Folk* v. *U. S.*, 233 Fed. 177, 192; *U. S.* v. *Midway Northern Oil Co.*, 232 Fed. 619, 631; *Sweet* v. *U. S.*, 228 Fed. 421, 428; *Chase* v. *U. S.*, 222 Fed. 593, 596; *U. S.* v. *Stinson*, 197 U. S. 200, 205; *Central Trust Co. of N. Y.* v. *Treat*, 192 Fed. 942; *U. S.* v. *Walker*, 139 Fed. 409, 412; *The Falcon*, 19 F. (2d), 1009, 1014.

> "It can require no argument to show that a transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of its assignor." (*United States* v. *Buford*, 3 Pet. 12, 30.)

Under the second amended complaint, the plaintiff must establish a clear legal title to the deposit. As its title must be based on the Russian decrees, the plaintiff cannot succeed unless it can establish that these decrees must be given extra-territorial effect with respect to private property here.

As comity will not be extended to allow the enforcement of foreign revenue, penal or confiscatory decrees, or decrees contrary to public policy, it cannot be resorted to here give effect to decrees of confiscation clearly opposed to our public policy.

In discussing the public policy of New York the petitioner relies on cases where the property was not here. In the

*Salimoff* case it was in Russia and in the *Dougherty* case the contract had been made in Russia and was there to be performed. Attempt is made to harmonize these and the *Vladikavkazsky* case, where the property was in New York, by adopting a narrow interpretation of the language there used. But the harmony is readily obtained if we recognize the distinction based on territorial jurisdiction over the property concerned.

We have no quarrel with the so-called Soviet plan of national economy. It is their business and not ours. We do say that they cannot confiscate property here and the *Vladikavkazsky* case and other New York cases give this support. Surely no one can say that the New York Court has not definitely said that these decrees are contrary to our public policy. Whether payment is to be made to the plaintiff in this case is not a question of Russian but of American law.

The statute did not divest the plaintiff of any rights, if it had none before enactment. The *Vladikavkazsky* case shows that there were none.

Finally, the Government maintains that the federal courts should not follow a local public policy in a case involving the international relations of the United States. But this case does not involve international relations of the United States in their true sphere. If the present Russian Government had at all times been recognized by our Government, the result would have been the same. There is no difference on this point in the law of the state or the nation. Rather than international relations, this case involves title to private property in the State of New York. This cannot be taken or affected by an executive agreement.

The cases cited by the Government to show that the federal courts sometimes know better than the state courts what the law is do not affect the question. There is no real doubt about the law, and hence the result does not in essence subject the enforcement of any right acquired by the United States under the agreement to the varying and uncertain

policies of each of the states. It is merely an application of what is probably universal law in this country and in others to a question of private property.

Where treaties and international undertakings have involved private rights *the courts* may find their rule of decision from their consideration of the treaty or undertaking. The interpretation of treaties, when ambiguous, devolves upon *the courts*, as does the interpretation of ambiguous contracts. See *U. S.* v. *Arredondo*, 6 Pet. 691; *Head Money Cases*, 112 U. S. 580, 598; *U. S.* v. *Rauscher*, 119 U. S. 407, 418; *Fraenkel, Juristic Status of Foreign States*, 25 Col. L. Rev. 544, 548.

There could have been a recognition of Russia without an approval of *all* of the legislation of the Russian State, of legislation hitherto always deemed abhorrent to our concepts of public policy and right, of confiscatory decrees in respect to property in this country. Therefore it cannot be said that recognition of the Soviet Government as a *de jure* government carried with it a recognition of such legislation, and it cannot be asserted that the Executive, through the act of recognition, has made any determination that these confiscatory decrees, *so far as they affect private property in this country*, are not contrary to public policy. This is not the necessary consequence of the act of recognition (although Judge MANTON'S dissent in *U. S.* v. *Bank of New York and Trust Company*, 77 F. [2d] 866, 878, is based on a contrary assertion). Recognition cannot preclude the courts from a consideration of public policy here because recognition does not determine the question. But even if it could be deemed that recognition provided some sort of Executive approval for these confiscatory decrees, the courts are still not precluded, for this is a matter of law for their judicial determination. See, *Borchard, The Unrecognized Government in American Courts*, 26 Amer. Journal of Int. Law, 261, 271.

And even as recognition does not determine public policy as to private property rights here, neither does acceptance

of the purported assignment constitute a declaration of public policy that binds the courts in dealing with private rights. Under our jurisprudence the Executive is only one branch of the Government. The People are sovereign, and Executive fiat cannot establish the public policy of the nation or state as to private property. Public policy as to private rights is a matter of law. Rules of law and not Executive command build up such public policy and to the judicial branch of our Government is entrusted the enunciation of these rules of law, to which the acts of the Executive are themselves subject. The whole theory of our Government with its system of checks and balances would fall if the Executive could at any time proclaim public policy as to private property and be thus enabled to overrule the courts as guardians of the Constitution and laws of this country.

The Court below construed the new Section 977-B of the New York Civil Practice Act as providing that the title of the confiscating government is not to be recognized at least until after the expiration of the period within which creditors or stockholders may claim it thereunder (R., p. 25). But if the arguments advanced by us on the principal questions here involved are sound, plaintiff should not be allowed recovery in this action in any event. The question here is whether it is in accord with public policy to uphold a title in the plaintiff to private property in this country that would destroy rights recognized here. These rights the Executors must defend, and would be in danger of surcharge under New York law, if they did not do so. Hence the question should be decided on the merits. (1)

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(1) As stated in the brief of the United States (Footnote, p. 42), a receiver was appointed of the assets of the Metal Company on June 25, 1936, under the New York Statute, who has served a demand on the respondents for the payment of the deposit account. This demand has not been complied with.

## POINT III

### It is Questionable Whether the Litvinoff Letter Assigned Title to the Deposit to the United States.

The Court below held that the language of the Litvinoff Letter (R., pp. 12-13) was sufficiently broad to cover the deposit account here in question (R., p. 23). That Letter states in substance that the U. S. S. R. will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due to it, as the successor of prior governments of Russia, or otherwise, from American nationals, and will not object to such amounts being assigned,

> "• • • and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialized Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment" (R., pp. 12-13).

The language is not clear and it seems arguable, at least, that it was not intended to include claims against private property based on the confiscatory decrees. The expression "amounts admitted to be due or that may be found to be due it" are susceptible of an interpretation that would restrict the assignment to governmental claims of the ordinary type. It is also arguable that the expression "due it • • • from American nationals" should not include amounts due to Russian individuals or corporations from American nationals. This would be consistent with the usual rule requiring reasonable interpretation of the document in case of doubt. As was said in *Rocca* v. *Thompson*, 223 U. S. 317, 332,

> "It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express

> their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms."

If this deposit account is to be included, it must be because of the words "or otherwise". The decree annexed to the Second Amended Complaint states that certain enterprises

> "• • • which are located within the borders of the Soviet Republic, together with all their capital and property regardless of what the latter may consist,"

are declared the property of the R. S. F. S. R. It does not state *where* the latter may be. It would have been simple to have cleared up this doubt by appropriate language. The intention to confiscate property in Russia is clear. To go beyond those limits is not so clear. A more reasonable interpretation would be that it was intended to convey claims owing directly to the Government or its predecessors.

The words "or otherwise" may refer to its own transactions, and the combined phrase "as the successor of prior governments of Russia or otherwise" may include the Imperial and Kerensky governments and their claims and perhaps also the *de facto* and unrecognized governments of Admiral Kolchak in Siberia and General Deniken in South Russia. See *Nankivel* v. *Omsk All Russian Government*, 237 N. Y. 150; *Voevodine* v. *Government, etc., South of Russia*, 232 App. Div. 204. The Soviet, not wanting to acknowledge these as prior governments and not being content to waive claim to any assets such pretended governments might have in this country, may have wished to cover such claims by general language. See *State of Russia* v. *National City Bank*, 69 Fed. (2d) 44.

Moreover, in view of the amount of litigation past and pending at the time of the Litvinoff Letter, the covenant not to make claims for judgments rendered or to be rendered by American courts relating to property or rights in which the Soviets or its nationals might have had or might claim to have an interest, would seem to be unnecessary if by the first part of the Letter these rights had already been assigned.

It may be noted also that the so-called final settlement of the claims and counterclaims between the Soviet and the United States governments and the claims of their nationals, to which the Letter is expressed to be preparatory, did not take place.

A treaty cannot operate on individual rights in any event until ratified. *Dooley* v. *United States*, 182 U. S. 222, 230; *Haber* v. *Yaker*, 9 Wall. 32. How much less so can this Letter be deemed effective to disturb private rights in this country when it has not been shown that the circumstances upon which, in effect, the assignment depended, have been fulfilled. The court below held that the language was sufficiently broad to permit of the construction that it covered claims acquired by confiscation of the property of Russian nationals. It is submitted that a better interpretation would be one which does not do violence to accepted principles of law or result in an interpretation requiring the courts to hold invalid action of the Executive contrary to our conceptions of law, public policy and justice.

The purported assignment here in question must be construed in conformity to recognized and accepted principles of international law and not in derogation of them. See *Delagoa Bay Railway Case*, 2 Moore, *International Arbitrations*, 1865, 1869; 21 *Amer. Journal of Int. Law*, 294; *Hyde, International Law*, Sec. 622; *Moore's Int. Law Digest*, Sec. 997. Where Mexican oil legislation has threatened the proprietary rights of Americans in Mexico the United States has been insistent upon protecting such rights. *Amer. Foreign Relations* (1931), page 143. Secretary of State

Kellogg wrote to the Mexican Minister of Foreign Affairs, July 31, 1926: "Lawfully invested rights of property of every description are to be respected and preserved in conformity with the recognized principles of international law and equity." *21 Amer. Journal of Int. Law, supra.*

But even assuming the application of the Litvinoff Letter, the arguments of the plaintiff are based on contentions that the Executive, not the courts, determines judicial public policy; that Executive fiat as to meaning precludes judicial construction of a treaty or Executive agreement; that action brought by the United States on an Executive document determines that it is not opposed to public policy; and that assets which are definitely in New York are in contemplation of law located in Russia—all of which are manifestly untenable.

## Conclusion

WHEREFORE it is submitted that the judgment and order of the District Court in dismissing the Second Amended Complaint herein and of the Circuit Court of Appeals in affirmance thereof were correct and should be affirmed on this appeal.

Respectfully submitted,

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